No. 03-311

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PAUL S. MINOR,

Petitioner,

v.

K-MART CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court abuse its discretion in levying sanctions under Fed. R. Civ. P. 11(b)(1) on an attorney who appropriated a judicial proceeding – judgment execution – with the purpose to embarrass the opposing party through an orchestrated media spectacle designed for self-promotion and harassment?

2. When violations of the duties listed in Fed. R. Civ. P. 11(b)(1) and Fed. R. Civ. P. 11(b)(2) are both found to exist, can they serve as independent grounds for sanctions under Fed. R. Civ. P. 11?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Kmart Corporation is the respondent in this matter. Kmart Corporation is a subsidiary of Kmart Management Corporation, which is a wholly-owned subsidiary of the publicly held Kmart Holding Corporation.

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BRIEF IN OPPOSITION

Respondent Kmart Corporation ("Kmart") requests that this Court deny the Petition for a Writ of Certiorari ("Petition") filed by Paul S. Minor, seeking review of an 11-3 *en banc* decision of the United States Court of Appeals for the Fifth Circuit.[1] The Fifth Circuit's decision (1) does not fairly present the issues raised in Minor's Petition, and

[1] *Whitehead v. Foodmax of Mississippi, Inc.*, 332 F.3d 796 (5th Cir. 2003) (*en banc*) (*Whitehead III*); Petition, at 1a.

(2) does not present a conflict in the decisions of the courts of appeals.

STATUTORY PROVISION INVOLVED

As discussed below in the Reasons for Denying the Writ, the only statutory provision at issue is Fed. R. Civ. P. 11(b) (hereinafter "Rule 11"):

> **(b) Representations to Court.** By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> **(3)** the allegations and other factual contentions have evidentiary support . . . ; ***and***
>
> **(4)** the denials of factual contentions are warranted on the evidence. . . .

(Emphasis added).

STATEMENT OF THE CASE

On May 27, 1997, the federal district court for the Southern District of Mississippi entered a $3.4 million judgment against Kmart. Kmart timely moved for a new trial and for remittitur, concurrently seeking a stay of execution of the judgment pending the resolution of its post-judgment motions. On August 18, 1997, the district court denied Kmart's new trial and remittitur motions and denied as moot Kmart's motion to stay pending resolution of the post-judgment motions. Although Mississippi procedural law, applicable to this diversity case under Fed. R. Civ. P. 62(f), provided for an automatic ten-day stay of execution following the denial of post-judgment motions, three days later the plaintiffs' counsel and petitioner herein, Minor, by a signed, handwritten request secured a writ of execution.[2]

Within the confines of the judicial proceeding of judgment execution, Minor notified the media. Accompanied by the press and two United States Marshals, Minor proceeded to the local Kmart store to execute the $3.4 million judgment on the contents of the store's cash registers and vault.[3] At the store with this media parade in tow, and still

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[2] Minor has attempted to argue that he felt compelled to execute on the judgment because Kmart refused to discuss settlement with him following the initial judgment. *See, e.g.*, Petition, at 5. However, "his claim that Kmart refused all communication is belied by [the one letter in the record reflecting Minor's efforts to communicate with Kmart]: 'I am sorry we have been missing each other *and I appreciate you returning my phone calls.*'" *Whitehead III*, 332 F.3d at 806; Petition, at 14a.

[3] As recognized by the *en banc* majority in the appeal of the ensuing sanctions award, "The execution did not require Minor to

(Cont'd)

under the aegis of the federal court's judgment execution proceeding, Minor issued statements to the press, stating that his client had "been victimized once by Kmart" and was being "victimized again by Kmart by them not paying a just debt." Minor repeated the accusation that Kmart had refused to pay the judgment, terming Kmart's actions (which consisted merely of invoking proper post-judgment and appellate procedures) as "arrogan[t]" and "outrageous," and as having "forced [Minor] to take the extreme measures of an execution of assets to satisfy and make [his] clients whole."[4] As Minor's counsel later admitted in briefing this matter to the Fifth Circuit *en banc* court, it was Minor's intention to create a media spectacle in order to "embarrass" Kmart into foregoing its appellate rights and settling the matter.[5]

Instead, Minor was ordered to halt his attempted execution of the judgment by the district court via a telephone

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(Cont'd)
accompany the two United States Marshals to the Kmart. . . . And, the execution certainly did not require the media's presence at the Kmart or the improper comments Minor made there to the media." 332 F.3d at 806-07; Petition, at 15a.

[4] Minor's comments to the media during the judgment execution proceeding are documented in the record in the videotape and newspaper articles attached to Kmart's motion for sanctions, R. 4:777, Docket No. 159; R. 4:781-82.

[5] *See* Answer in Response to Petition for Panel Rehearing, at 1 ("Minor does not dispute that a factfinder could find that he knew his actions would 'embarrass' Kmart. The hope was that the publicity would move the company's silence into normal post-judgment attorney communication and resolve the matter."); *see also Whitehead III*, 332 F.3d at 807, Petition at 15a-16a.

conference with Minor and Kmart's counsel.[6] Kmart subsequently moved for Rule 11 sanctions against Minor, on the grounds that (1) Minor had not made a reasonable inquiry into his legal basis for applying for the writ of execution in the face of the Mississippi automatic stay provision and its applicability under Fed. R. Civ. P. 62(f), and (2) Minor had applied for the writ with the improper purpose of using the court proceeding to embarrass Kmart through the orchestration of adverse publicity.

Following the reversal of the damages portion of the underlying judgment by the Fifth Circuit,[7] the district court ruled on Kmart's sanctions motion, issuing the carefully crafted eighteen-page opinion at issue here. *Whitehead v. Kmart Corp.*, 202 F. Supp.2d 525 (S.D. Miss. 1999); Petition, at 53a. The court found that the scope of Minor's pre-writ inquiry into his legal basis for executing on the judgment prior to the expiration of the Mississippi ten-day automatic stay was inadequate: "Minor failed to make a reasonable inquiry into the law governing execution of judgments in this case." *Id.* at 532; Petition, at 64a. "Additionally," the district court found that the publicity generated during Minor's attempted execution showed that "[i]t is clear . . .

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[6] For the first time in these proceedings, and unsupported by the record, Minor contends in his Petition that ***he*** responsibly halted his attempted judgment execution at the request of Kmart's counsel. Petition, at 5. In fact, as described in the district court's sanction opinion, it was at the district court's direction "through the United States Marshal's office," that Minor was ordered "to cease and desist pending a telephone conference." *Whitehead v. Kmart Corp.*, 202 F. Supp.2d 525, 527 (S.D. Miss. 1999); Petition, at 56a.

[7] *Whitehead v. Foodmax of Mississippi, Inc.*, 163 F.3d 265 (5th Cir. 1998) (*Whitehead I*); Petition, at 69a.

that [Minor] was seeking to embarrass the defendant and call attention to himself." *Id.* at 533; Petition, at 66a. On these two bases, the district court carefully tailored a sanction of $7,685 to reimburse Kmart for the attorneys' fees incurred in defending the judgment execution, and ordered publication of its opinion. *Id.* at 533-34; Petition, at 67a-68a.

The district court's sanctions award occurred against a backdrop of a well-developed pattern of improper conduct by Minor,[8] which was chronicled in the Fifth Circuit's decision in the first appeal of the May 27, 1997, judgment. The Fifth Circuit reversed the underlying damages award because of Minor's "blatant appeal to sectionalism," "shameless refusal to abide by the district court's sustaining Kmart's objections," "total defiance of the district court's ruling," and "highly prejudicial statements during closing argument." *Whitehead I*, 163 F.3d at 276-77; Petition, at 89a-91a. During the initial trial of the underlying merits, the district court had levied a $1,000 fine on Minor "for violating its earlier warning to respond to the court, not to counsel." *Id.* at 277 n.3; Petition, at 90a n.3. Minor's improper behavior extended from the district court to his appeal of the merits before the Fifth Circuit, embodied in "extremely inappropriate appeals to emotion at oral argument" and the presentation in his appellate brief of evidence that had been excluded by the district court. *Id.* at 278 n.4; Petition, at 93a n.4.

A three-judge panel of the Fifth Circuit reversed the award of sanctions on a 2-1 vote. *Whitehead v. Foodmax of*

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[8] As observed in the Advisory Committee Notes to the 1993 Amendment of Rule 11, whether improper conduct "was part of a pattern of activity, or an isolated event," is a legitimate factor that a district court can consider in imposing sanctions.

Mississippi, Inc., 277 F.3d 791 (5th Cir. 2002) (*Whitehead II*); Petition, at 32a. The panel engaged in a *de novo* legal review of Kmart's right to enjoy the Mississippi-law automatic ten-day stay under Fed. R. Civ. P. 62(f), rather an abuse of discretion review of the district court's factual finding that Minor's legal inquiry was unreasonable, and on the basis of this *de novo* review found that a legitimate legal basis for the judgment execution existed. *Id.* at 794-96; Petition, at 36a-40a. Then, despite finding that Minor's "intentional use of publicity for the purpose of embarrassing an adversary is ***patently inappropriate***," with a further admonition that Minor's conduct should be addressed by Mississippi bar authorities, the majority did not uphold the district court's finding that Rule 11 sanctions were justified on the basis of Minor's improper purpose. *Id.* at 796-97 (emphasis added); Petition, at 41a.

Following Kmart's petition for panel rehearing, the Fifth Circuit *sua sponte* ordered an *en banc* rehearing. *Whitehead v. Foodmax of Mississippi, Inc.*, 308 F.3d 472 (5th Cir. 2002) (*en banc*). This order vacated the panel decision. 5th Cir. L.R. 41.3. In an 11-3 decision, the *en banc* Fifth Circuit affirmed the district court's award of sanctions against Minor. *Whitehead III*, *supra*; Petition, at 1a.

Because the district court based its sanctions award on two independent bases for sanctions under Rule 11, the *en banc* majority observed that "it is only necessary to decide whether [Minor] violated one." *Whitehead III*, 332 F.3d at 803; Petition, at 9a. The *en banc* majority criticized the panel majority's *de novo* approach to the issue of Minor's inquiry into his legal basis for applying for the writ of execution, noting that "the panel should have addressed whether Minor's belief was objectively reasonable *at the time* he requested

the writ." *Id.* at 804; Petition, at 10a. Then, contrary to Minor's suggestion in the Petition, the *en banc* court did not hold that "Minor had properly certified that . . . the legal contentions he had presented in obtaining the writ of execution and levying were warranted by existing law." Petition, at 9. To the contrary, the *en banc* court only assumed compliance with Rule 11(b)(2) *arguendo*, in light of its holding that Minor's noncompliance with the independent ground in Rule 11(b)(1) was sufficient to support the district court's sanctions award. 332 F.3d at 804; Petition, at 10a. Holding that a district court may levy sanctions under Rule 11 on the sole basis that "it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose," *id.* at 805, Petition at 12a, the *en banc* court applied the proper deference to the district court's sanctions determination and upheld the sanctions. *Id.* at 808-09; Petition, at 18a-19a.[9]

REASONS FOR DENYING THE PETITION

A. The Questions Raised By Petitioner Are Not Fairly Presented By The Fifth Circuit's Decision.

In phrasing his "Questions Presented," the petitioner has included issues that are not presented by the Fifth Circuit's decision. This is not a case involving First Amendment implications. Neither is it a case that presents as a necessary

[9] Despite the Fifth Circuit's *en banc* affirmance of the sanctions award, a subsequent denial of Minor's petition for rehearing of the *en banc* decision, the issuance of the mandate, the lack of any motion by Minor to stay the mandate pending his petition for certiorari, and repeated written requests by Kmart, Minor continues to ignore the order of the district court to pay Kmart the monetary portion of the sanction – $7,685, plus judicial interest. The sanction remains unpaid.

matter the issue of whether Rule 11(b)(1) grounds support sanctions in the absence of Rule 11(b)(2) grounds. Accordingly, this Court should not grant the writ of certiorari to address the questions presented by Minor.

1. The Fifth Circuit's Decision Does Not Raise First Amendment Concerns.

The petitioner misapprehends the conduct that was sanctioned by the district court, and in so doing posits as a "question presented" that the First Amendment is violated by the sanction imposed in this case. Minor's First Amendment argument is a red herring – he was not sanctioned for his remarks to the media, but for his misuse of a judicial proceeding. *Whitehead III*, 332 F.3d at 807-08; Petition, at 17a. The sanction was levied for Minor's misuse of the judicial process for self-promotion and to embarrass the opposing party, as to which the collateral media play was merely evidence and not the sanctionable conduct itself. 202 F. Supp.2d at 533; Petition, at 66a.

This distinction is subtle, but critical. The distinction is clearly illustrated by the First Amendment cases relied on by the petitioner. In each of those cases, one or both of the following characteristics were present: (1) it was the content of the attorneys' statements that drew the sanction or reprimand at issue, and (2) those statements were issued outside of a judicial proceeding. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991) (attorney reprimanded for statements made in a press conference following client's indictment); *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 77-78 (2d Cir. 2000) (attorney sanctioned under 28 U.S.C. § 1927 and under the court's inherent powers for, *inter alia*, threatening letters sent to opposing counsel and for issuing

embarrassing and baseless accusations in releases to the media, all made outside of court); *Sussman v. Bank of Israel*, 56 F.3d 450, 455 (2d Cir. 1995) (attorney sanctioned under Rule 11 for threatening content of pre-litigation letters); *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990) (attorney sanctioned under Rule 11 for, *inter alia*, holding a press conference to announce the filing of a lawsuit). Because the sanctions reached the actual content of speech made outside of a judicial proceeding, these cases implicated the First Amendment.

In this case, however, the sanction was not levied on the content of Minor's speech. Moreover, the sanctionable conduct occurred within the context of a judicial proceeding – the execution of a judgment. Tellingly, the district court never quoted the actual content of Minor's media statements in describing the improper purpose that warranted sanctions, but only noted that the statements illustrated Minor's improper purposes of seeking to embarrass Kmart and drawing attention to himself. 202 F. Supp.2d at 533; Petition, at 66a. More importantly, despite Minor's attempt in his petition to portray his actions broadly as being analogous to attorneys who hold press conferences to announce a lawsuit or a step in litigation, here Minor was engaging in theatrics within the auspices of a judicial proceeding.

Minor was not out on the courthouse steps opining to the press about Kmart's "arrogant" and "outrageous" conduct, but instead appropriated a judicial process to embarrass Kmart into settlement with the implied approval and authority of the court itself. Minor's suggestion, therefore, that the district court's sanction threatens "First Amendment values" is fanciful. It was for his hijacking of the judicial process for

his own gain that Minor was sanctioned, not for the content of his remarks to the media. Accordingly, Minor cannot dress his conduct in the insulating garb of the First Amendment merely by the fact of having spoken to the media during the course of the judgment execution.[10] The First Amendment's protections are not implicated by the district court's award of sanctions; therefore, that question is not fairly presented to this Court by the Fifth Circuit's decision.

2. The Fifth Circuit's Decision Does Not Adequately Present The Issue Of The Independence Of The Rule 11 Ground For Sanctions.

Resolution of the question whether Rule 11(b)(1) grounds support Rule 11 sanctions in the absence of Rule 11(b)(2) grounds will not resolve the question in this

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[10] Furthermore, the importance of the distinction between legitimate First Amendment cases and this case can be seen in Minor's own delay in making the First Amendment argument. Only after the district court issued sanctions and after the original panel opinion was vacated did Minor construct his ill-fitting First Amendment argument. At that point, as explained by the Fifth Circuit in its *en banc* opinion, the argument was too late and had been waived. *Whitehead III*, 332 F.3d at 807; Petition, at 16a-17a. Minor asserts in his petition that he "argued" the First Amendment claim by including a block-quote from *Sussman* that alluded to (but did not analyze) "First Amendment implications." However, this vague one-time reference at the end of a block-quote included for its general Rule 11 argument did not amount to actual pursuit of the First Amendment argument, and did not suffice to preserve the argument for appeal to the Fifth Circuit. *See Whitehead III*, 332 F.3d at 807, Petition at 16a-17a; *see also Quick Technologies, Inc. v. Sage Group PLC*, 313 F.3d 338, 343 n.3 (5th Cir. 2002); *Lifemark Hospitals, Inc. v. Liljeberg Enters., Inc.*, 304 F.3d 410, 432-33 (5th Cir. 2002).

case of whether the district court abused its discretion in awarding sanctions against Minor. Although the district court announced that its findings under Rule 11(b)(1) were "additional[]" to its findings under Rule 11(b)(2), the district court did not base its sanctions award solely on Rule 11(b)(1)'s improper purpose ground. The district court also based its award of sanctions on a finding that Minor had violated Rule 11(b)(2). 202 F. Supp.2d at 532-33; Petition, at 65a-66a. The Fifth Circuit panel decision addressed the district court's finding of improper legal inquiry under Rule 11(b)(2), but that discussion was vacated by the granting of the *en banc* rehearing; the *en banc* majority subsequently did not disturb the district court's Rule 11(b)(2) finding. The case that would adequately present to this Court the question that has been posited by the petitioner is one in which ***the only basis*** for sanctions cited by the district court would be a Rule 11(b)(1) improper purpose. This is not that case.

In addition to its improper purpose finding, the district court also found pursuant to Rule 11(b)(2) that Minor did not engage in a reasonable inquiry into his legal basis for applying for the writ of execution. 202 F. Supp.2d at 532; Petition, at 65a. Even were this Court to determine that the district court's additional finding under Rule 11(b)(1) was inadequate on its own to support the award of sanctions, then the question would remain in this case whether the district court abused its discretion in finding sanctions warranted on Rule 11(b)(2) grounds or a combination of the Rule 11(b)(1) and (b)(2) grounds. This abuse-of-discretion review would require an examination into whether Minor's inquiry into the legal basis for applying for the writ of execution three days after disposition of the post-judgment motions was

objectively reasonable in light of the potential applicability of Mississippi procedural law to this federal diversity case under Fed. R. Civ. P. 62(f).[11]

Resolving these questions would mire this Court in a "fact-dependent" review of the district court's exercise of discretion in awarding sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990).[12] Thus, to resolve fully the

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[11] Minor's Petition neglects to challenge the correctness of the district court's award of sanctions on the basis of Rule 11(b)(2). While Minor assumes that this question was somehow settled in the course of this appeal, as noted above, the only valid decision remaining in this case regarding the reasonableness of Minor's inquiry into his legal basis is the district court's finding that Minor's inquiry was unreasonable and therefore sanctionable. The only determination to the contrary –the panel decision's incorrect *de novo* analysis of Kmart's duties under Fed. R. Civ. P. 62(f) and Miss. R. Civ. P. 62(a) – was vacated when the Fifth Circuit granted *en banc* rehearing. Kmart has consistently argued during these proceedings that the district court did not abuse its discretion in determining that Minor's inquiry was unreasonable, and this argument will need to be addressed again if this Court grants Minor a writ of certiorari.

[12] *See Cooter & Gell*, 496 U.S. at 404:

> The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court.

issues presented in this case under the abuse-of-discretion standard prescribed in *Cooter & Gell*, this Court's review would necessarily devolve into the fact-review and error-correction that the Court has repeatedly found to be alien to its certiorari function. *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("[C]ertiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases."); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss particular facts.").

B. There Is No True Circuit-Conflict Presented By The Fifth Circuit's Decision.

In an effort to gain review, Minor points to an alleged circuit conflict on the interpretation of Rule 11(b)(1) and (b)(2). Yet the ostensibly conflicting circuit decisions cited by Minor in his petition relate to the ***1983*** version of Rule 11; accordingly, they do not illustrate a conflict with the Fifth Circuit decision, which applies Rule 11 as amended in ***1993***. Moreover, the pre-1993-amendment decisions cited by petitioner are otherwise distinguishable from the Fifth Circuit's decision because they relate solely to the invocation of Rule 11 to sanction attorney conduct at the initiation of access to the court, not at the conclusion of court proceedings as in an execution of judgment.

1. The 1993 Amendment To Rule 11 Resolves Any Prior Circuit Conflict.

The 1983 version of Rule 11 lumped into one entangled mass the description of the rule's certification requirement:

> The signature of an attorney . . . constitutes a certificate by the signer that . . . to the best of the

> signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11 (1984). Although the parts of this compound sentence are connected by the conjunctive "and," the rule's appearance and structure – the clauses barely separated by commas – make for little wonder that circuits interpreting the 1983 version of the rule split as to whether the certifiable duties in the rule were intertwined or distinct.

As set forth at the beginning of this Opposition, and as discussed by the *en banc* majority in the Fifth Circuit's decision, the 1993 amendment to Rule 11 has provided order to the rule's multiple requirements and has harmonized any split that developed in interpreting the earlier incarnation of the rule. *See Whitehead III*, 332 F.3d at 804 n.4; Petition, at 11a n.4. Under the 1993 amendment, each of the Rule 11 duties are extracted into separately enumerated subsections and separated by semi-colons, emphasizing their distinct nature. Fed. R. Civ. P. 11(b)(1)-(4) (2003). They are then conjoined with an "and" to make clear that the signer must certify that ***each*** of these distinct duties has been fulfilled. *Id.* at 11(b)(3). The 1993 amendment thus clarifies that, when one duty is unfulfilled, such as the duty to not submit

a paper with an improper purpose, then the signer has violated Rule 11.[13]

In arguing that the circuit-split under the 1983 amendment is still present under the 1993 amendment, Minor relies almost exclusively on pre-1993-amendment cases. Petition, at 16-19.[14] The only two post-1993 cases cited by Minor both rely on the pre-1993 Ninth Circuit decision in *Townsend* for the premise that a well-founded complaint filed with an improper purpose cannot be sanctionable, but do not analyze the impact of the 1993 amendment on the *Townsend*

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[13] *See* C. Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 B.Y.U. L. Rev. 1, 29 (2001):

> [W]hen it modified Rule 11 in 1993 (to its current form), . . . the committee made some form changes to the rule that tended to reinforce the view that proper purpose is an independent requirement. Rulemakers numbered each of the certification standards as separate subparagraphs and gave the improper purpose clause added prominence by listing it as the first (rather than last) certification standard. Yet, the rulemakers did not tinker with one crucial element: the new Rule 11 continues to join the improper purpose clause to the merits standards with the word "and." To be sure, the drafters could have clarified the issue in the advisory committee notes, but it is difficult to imagine any other changes to the rule itself that would have more firmly underscored the idea that proper purpose is an independent requirement.

[14] *Citing Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990); *Lancellotti v. Fay*, 909 F.2d 15 (1st Cir. 1990); *Burkhart v. Kinsley Bank*, 852 F.2d 512 (10th Cir. 1988); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987).

decision. *See Sussman*, 56 F.3d at 455; *Harcourt Brace Jovanovich Legal & Prof'l Publ'ns v. Multistate Legal Servs.*, 26 F.3d 948, 953 (9th Cir. 1994). The secondary authorities Minor relies on to support his premise that the circuit-split has survived the 1993 amendment suffer from a similar lack of citation to cases either post-dating the 1993 amendment or analyzing the impact of the 1993 amendment on the question.[15]

In sum, in light of the 1993 amendment's clarification of the independent nature of the Rule 11(b)(1)-(4) duties as independent, no circuit-split presently exists. Minor has cited to no other circuit that has analyzed the impact of the 1993 amendment in the careful manner undertaken by the Fifth Circuit in its *en banc* decision and concluded that an improper purpose cannot independently support Rule 11 sanctions. Accordingly, this Court is ***not*** presented with an opportunity to resolve any circuit-split.

2. There Has Never Been A Circuit-Split Regarding Sanctioning In Post-Judgment Proceedings For Improper Purpose.

Not only is there no circuit conflict regarding the independent nature of the Rule 11(b)(1)-(4) duties under the 1993 amendment, but the circuits pre-1993 were not in conflict regarding sanctioning of post-judgment conduct.

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[15] *See, e.g.*, 2 James Wm. Moore, Moore's Fed. Prac. § 11.11[8][d] (2003 ed.); C. Andrews, *supra*, at 25-34. Of the cases relied on by the Solovy article cited by Minor, with the exception of one case that blindly relies on the pre-1993-amendment *Townsend* decision the post-1993 decisions only support the interpretation that Rule 11(b)(1) can serve as an independent ground for sanctions. J. Solovy, *Sanctions Under Rule 11*, 69 PLI/LIT 235, at 310-21 (2003).

The decisions relied on by Minor to show that some circuits treat the improper purpose and appropriate legal inquiry duties as intertwined all concern the filing of pleadings setting forth an initial theory of relief, such as a complaint. *See Sussman*, 56 F.3d at 454-55 (sanctions related to complaint); *Harcourt*, 26 F.3d at 950-53 (sanctions related to complaint and to contempt motion setting forth initial complaint of violation of consent decree); *Townsend*, 929 F.2d at 1361 (sanctions related to complaint); *Kunstler*, 914 F.2d at 518 (sanctions related to complaint). Those courts' concern is that the imposition of sanctions for an improper purpose when a complaint is nevertheless well-grounded may deter access to courts by parties with meritorious claims. Sanctioning an improper purpose for potentially executing on a judgment prematurely, however, does not raise the same access barriers, but only ensures that judgment execution is carried out in strict adherence to each of the parties' substantive and procedural rights.

At least one commentator has recognized the pervasiveness and importance of the access-to-courts issue in decisions that read the Rule 11 duties as intertwined: "Indeed, most of these courts distinguish initial access, the filing of the complaint, from later litigation steps, such as the filing of a motion. They refuse to sanction meritorious complaints ***but leave open the possibility of sanctions against litigants who file motions for improper purposes***." Andrews, *supra*, at 26 (emphasis added). Because the sanctions here were levied with regard to Minor's conduct related to the ***post-judgment*** proceeding of judgment execution, and not to Minor's "initial access" to the court's relief, the Fifth Circuit's affirmance of the sanctions award does not present a conflict with the circuit decisions cited by Minor. Indeed, more so than other "later litigation steps," the execution of a judgment must be undertaken with utmost attention to each of the Rule 11 duties because the imprimatur of official judicial authority accompanies the writ of execution.

CONCLUSION

As shown above, this case does not present issues worthy of this Court's exercise of its certiorari jurisdiction. Although the petitioner attempts to frame the questions presented by the Fifth Circuit's decision as involving important questions of First Amendment infringement, it simply does not do so. The sanctions at issue in this case will not deter attorneys from ever speaking to the media, whether to "gather before microphones" outside this Court[16] or to hold press conferences announcing the initiation of litigation. Rather, the carefully tailored sanctions awarded by the district court should deter attorneys from abusing and misappropriating a judicial proceeding by transforming the execution of a judgment into a court-endorsed media spectacle and source of embarrassment to their opponents.[17] Because the sanctions here are restricted to this narrow context of the court-authorized execution of judgment, Minor's regrettable suggestion made here and to the Fifth Circuit that "almost every step in litigation intends to embarrass the opposing party" is irrelevant. Every other step in litigation involves an action taken on behalf of one party or the other and not imbued with the court's own authorization. The writ of execution, however, occurs under the auspices of the court, and it should not be twisted to Minor's improper purposes.

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[16] Petition, at 22.

[17] Indeed, to the extent any legitimate conduct will be chilled by these proceedings, it will be the pursuit of Rule 11 sanctions for violative actions in the future. In the effort to defend the meritorious award of sanctions issued by the district court, Kmart and its attorneys have had to expend many times the $7,685 in monetary penalties originally levied by the court. Few litigants, even when faced with grave misconduct by their opponents, will embrace the amount of effort that enforcement of Rule 11 exacts from harmed litigants.

Moreover, the particular facts of this case illustrate that it does not adequately and cleanly present to this Court the question of whether Rule 11(b)(1) may be a ***sole*** ground for sanctions. Instead, the Court would become enveloped in an intensive fact-review because the sanctions awarded in this case are based on ***multiple*** independent bases under Rule 11. As a result, any resolution of this case by this Court would necessarily be fact-bound under the appropriate standard of review.

Finally, the inter-circuit "confusion" identified by the petitioner is not addressed by the Fifth Circuit's decision. The Fifth Circuit's decision focuses on the post-1993 formulation of Rule 11 while the "conflicting" circuit decisions do not; and the "conflicting" decisions are distinctly concerned with matters related to initial access to the courts, which is not the same concern addressed by the Fifth Circuit.

The attention of this Court is not merited.

Respectfully submitted,

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